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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BRIAN HARNEY, BRETT DEBOARD, and DARLA GREINER, on Behalf of Themselves and All Others Similarly Situated,

Petitioners,

v.

SPEEDWAY SUPERAMERICA, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Seventh Circuit abused its discretion by refusing to certify certain questions of state-law to the Indiana Supreme Court thereby causing an unacceptable conflict between state and federal appellate courts.

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PETITION FOR A WRIT OF CERTIORARI

Brian Harney, Brett DeBoard, Darla Greiner and the proposed Classes ("Employees")[1] respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit, dated May 30, 2008, is officially reported at 526 F.3d 1099, and is reproduced at App. 1-18.

The Memorandum Opinion and Order of the U.S. District Court for the Southern District of Indiana, Indianapolis Division, dated September 13, 2007, is reproduced in its entirety in the May 30, 2008 opinion of the Seventh Circuit, App. 5-18, and unofficially reported at 2007 U.S. Dist. LEXIS 68033.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Seventh Circuit sought to be reviewed was entered on May 30, 2008. Petitioners timely filed a Petition for Panel Rehearing on June 27, 2008. The Seventh Circuit denied Petitioners' Petition for Panel Rehearing by an order dated July 15, 2008 which is reproduced at App. 19. This petition

[1] "Employees" references employees of Respondent who work at or out of Indiana locations and who should have been paid bonus wages on or after November 29, 2003.

is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.1 and 13.3 because it is being filed within 90 days of the denial of rehearing. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1254(1).

COURT RULES INVOLVED

Seventh Circuit Rule 52(a)

When the rules of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, *sua sponte* or on motion of a party, may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision of the question certified. The certification will be made after the briefs are filed in this court. A motion for certification shall be included in the moving party's brief.

Indiana Appellate Rule 64(a)

The United States Supreme Court, any federal circuit court of appeals, or any federal district court may certify a question of Indiana law to the Supreme Court when it appears to the federal court that a proceeding presents an issue of state law that is determinative of the case and on which there is no clear controlling Indiana precedent.

STATEMENT OF THE CASE

Employees contend that the manner in which Respondent, Speedway SuperAmerica, LLC ("Employer") pays and forfeits bonus wages violates Indiana's Wage Payment Statute, I.C. §22-2-5 *et. seq.*, and Wage Claims Statute, I.C. §22-2-9 *et. seq.* Specifically, Employees assert four different proposed Classes against Employer. The Monthly Class is on behalf of all store managers, associate managers and lead assistant managers of Employer who are not paid their monthly Store Manager Bonus or Associate / Lead Assistant Manager Bonus in accordance with the Ten Day Rule of the Wage Payment Statute, I.C. §22-2-5-1(b). The Quarterly Class is on behalf of all assistant managers and customer service representatives of Employer who are not paid their Customer Satisfaction Reward ("CSR") bonuses in accordance with the Ten Day Rule of the Wage Payment Statute. The Quit Class is on behalf of all former Employees of Employer who voluntarily separated and were not paid their regular and bonus wages in a timely fashion or in the correct amount in accordance with the Wage Payment Statute. The Terminated Class is on behalf of all former Employees of Employer who involuntarily separated and were not paid their regular and bonus wages in a timely fashion or in the correct amount in accordance with the Wage Claims Statute.

Mr. Harney began employment with Employer in April 2004. Mr. Harney worked for Employer as an assistant store manager and earned quarterly bonuses. Mr. Harney was fired by Employer on October 11, 2005. Following his separation, Mr. Harney was not paid the CSR bonus earned during the quarter including July, August and September 2005 by Employer.

Mr. DeBord began employment with Employer in March 2001. Mr. DeBord was a lead assistant manager between January 1, 2003 and December 31, 2004 and earned monthly bonuses during this time period. Mr. DeBord was an assistant manager from January 1, 2005 to October 11, 2005 and earned quarterly bonuses. Mr. DeBord, was fired by Defendant on October 11, 2005. Following his separation, Mr. DeBord was not paid the CSR bonus earned during the quarter including July, August and September 2005 by Employer.

Ms. Greiner began employment with Employer on December 17, 1996. Ms. Greiner was a store manager for Employer and earned monthly bonuses. Ms. Greiner quit her employment with Employer on October 11, 2005. Following her separation, Ms. Greiner was not paid the Store Manager bonuses earned in August and September 2005 by Employer.

The Store Manager Bonus Program and the Associate/Lead Assistant Manager Bonus Program allow store managers, associate managers, and lead assistant managers to earn monthly bonuses based on attaining monthly performance objectives at their individual stores. Both bonus programs contain a retention element which requires that a manager be employed with Employer on the last day of the second month following the month in which the bonus is earned. For example, in order for a manager to earn the monthly bonus for January, a manager must be employed by Employer on March 31st. The bonuses are then paid to these managers on the second paycheck of the following month. Thus, the monthly bonus for January is paid on the second Friday in April.

The CSR Program permits assistant managers and customer service representatives to earn quarterly bonuses

based on attaining monthly performance objectives at their individual stores. The CSR bonus is calculated based upon the earnings of an employee in a particular month. The CSR bonus is calculated monthly, but paid quarterly. The CSR Program also has a retention provision which requires that an employee be employed with Employer on the last day of the second month following the quarter in which the bonus is earned. For example, an employee must be employed with Employer on May 31st in order to earn the quarterly bonus encompassing January, February and March. The CSR bonus is then paid the following month. Thus, the January thru March quarterly bonus is paid in June.

Employees allege that the various bonuses at issue are "wages" under Indiana law. As such, the payment of these bonuses is governed by Indiana's Wage and Hours statutes. Specifically, Employees via the Monthly and Quarterly Classes contend that their bonuses are not paid in compliance with the Ten Day Rule, I.C. §22-2-5-1(b), which requires that "wages" must be paid within ten business days of the compensable time period in which the "wage" are earned. Rather, the facts demonstrate that Employees are paid their bonuses roughly two and one-half months after the month or quarter in which the "wages" are earned.

Additionally, Employees assert that these bonuses constitute "present" compensation, not "deferred" compensation under Indiana law. Therefore, as a matter of law, these bonuses could only be forfeited via contract. No contractual basis for the forfeiture of these bonuses owed to Employees and the potential members of the Quit and Terminated Classes exists.

Employees filed their complaint against Employer on November 29, 2005 in the Southern District of Indiana,

Indianapolis Division. On March 28, 2006, Employer filed its Motion for Summary Judgment arguing that each of the bonuses at issue did not constitute "wages" under Indiana law. On January 23, 2007, Employees filed a Motion to Stay Employer's Motion for Summary Judgment pending the decision of the Indiana Supreme Court in *Naugle v. Beech Grove City Schools,* 864 N.E.2d 1058 (Ind. 2007) and the Indiana Court of Appeals in *Swift v. Speedway SuperAmerica LLC,* 861 N.E.2d 1212 (Ind. Ct. App. 2007).[2] On February 9, 2007, the Court stayed Employer's Motion for Summary Judgment pending the rulings of the Indiana appellate courts.

On February 26, 2007, the Indiana Court of Appeals issued its opinion in *Swift* holding that the monthly bonuses of the plaintiff/store manager earned under the identical Store Manager Bonus Program constituted a "wage" under Indiana law. *Swift,* 861 N.E.2d at 1216. The *Swift* decision also found that the monthly bonus was "deferred" compensation due to the retention element of the bonus program. *Id.* On April 27, 2007, the Indiana Supreme Court issued its decision in *Naugle* recognizing the existence of the Ten Day Rule. *See Naugle,* 864 N.E.2d 1058. On May 24, 2007, the plaintiff/store manager in *Swift* filed her Petition for Transfer with the Indiana Supreme Court requesting that the Court grant transfer to consider if the retention element of the bonus program violated the Ten Day Rule and to reverse the holding of the Indiana Court of Appeals that the monthly bonuses constitute "deferred" compensation that can be forfeited without a contract. The Indiana Supreme Court denied the Petition for Transfer on August 7, 2007. On September 11,

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[2] Counsel for Petitioners below was also counsel for the plaintiff/employees in these two actions.

2007, Employees filed notice of the decision of the Indiana Court of Appeals in the *Reel v. Clarian Health Partners, Inc.*, 873 N.E.2d 75 (Ind. Ct. App. 2007).[3] In *Reel*, the Indiana Court of Appeals held that an employer could not circumvent the time dictates of Indiana's Wage Payment Statute. *See Reel*, 873 N.E.2d 75.

On September 13, 2007, the District Court granted Employer's Motion for Summary Judgment. The District Court made the following rulings: (1) wage claims involving wages paid during employment are governed by the Wage Payment Statute; (2) if the bonuses are "wages," then they are "deferred" compensation subject to forfeiture; and (3) the bonuses are not "wages" because they are (a) contingent on factors other than time worked and an individual's performance and (b) the retention provisions. The District Court did not address whether the retention elements of the bonus programs of Employer violated the Ten Day Rule.

On October 12, 2007, Employees filed their Notice of Appeal. Employees filed a Motion to Certify Questions of State Law to the Indiana Supreme Court and Stay Proceedings in compliance with Circuit Rule 52(a) and Indiana Appellate Rule 64(a). Specifically, Employees sought to certify three (3) questions to the Indiana Supreme Court as follows: (1) whether these bonuses constitute "wages" under Indiana law; (2) whether the retention element of the bonus programs violates the Ten Day Rule and is void as a matter of law; and (3) whether these bonuses constitute "present" or "deferred" compensation. The Seventh Circuit issued its opinion affirming the decision of the District Court on May 30, 2008. The Seventh Circuit made the following holdings: (1) adopted

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[3] Counsel for Petitioners below is also counsel for the plaintiff/employees in the *Reel* action.

the reasoning of the District Court; (2) denied Employees' Motion to Certify Questions; (3) the Indiana Supreme Court has already provided guidance on when bonuses are "wages;" and (4) Indiana law permits employers to condition bonuses however an employer sees fit. On June 12, 2008, Employees filed a Motion to Extend Deadline to File Petition for Rehearing. On June 23, 2008, the Seventh Circuit granted Employees until June 27, 2008 to file their Petition for Rehearing. Employees filed their Petition for Panel Rehearing on June 26, 2008. The Seventh Circuit denied the Petition for Panel Rehearing by an order dated July 15, 2008.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit abused its discretion by denying the request of Employees to certify questions to the Indiana Supreme Court. The opinion of the Seventh Circuit has placed Indiana practitioners and litigants in the untenable position where the venue of a lawsuit determines whether a bonus is a "wage" or not. Indiana trial courts are bound by controlling precedent as articulated in *Swift* to find that bonus programs akin to the Store Manager Bonus Program are "wages" under Indiana law. *Swift*, 861 N.E.2d at 1216. Conversely, Indiana district courts are required to follow the conflicting decision of the Seventh Circuit in this matter. Clearly, the certification process was developed to avoid this type of conflict between state and federal appellate courts. Moreover, the Seventh Circuit is in error that the bonuses in question in this matter are unique and that a decision by the Indiana Supreme Court regarding these bonuses would not provide guidance on the application of Indiana's Wage and Hour Acts on other

bonuses. Finally, as a matter of Indiana law, the finding by the Seventh Circuit that an employer is permitted to condition a bonus as it sees fit is erroneous.

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE STATE AND FEDERAL APPELLATE COURTS.

A. What Contingencies Affect Whether a Bonus is a "Wage" or Not Pursuant to Indiana Law has Not Been Clarified by the Indiana Supreme Court.

What constitutes a "wage" under Indiana's Wage and Hours Acts is a highly contentious issue at this time. Since the Indiana Supreme Court recognized in *Naugle* that the Ten Day Rule is a time dictate that governs the payment of "wages," this ruling has drawn into question the legality of the commission and bonus payment schedules of Indiana employers for thousands of Indiana employees. The focus of this new litigation centers on what contingencies affect whether a commission or bonus is a "wage."

To date, the Indiana Supreme Court has only identified one contingency which affects whether a bonus is or is not a "wage;" namely, financial success of an employer, i.e. profitability. *See Highhouse, M.D. v. Midwest Orthopedic Inst., P.C.*, 807 N.E.2d 737, 740 (Ind. 2004); *see also Prime Mortgage USA, Inc. v. Nichols*, 885 N.E.2d 628, 663 (Ind. Ct. App. 2008) (bonus not a "wage" because based upon profitability of company); *Gress v. Fabcon, Inc.*, 826 N.E.2d 1, 3 (Ind. Ct. App. 2005) (commission based upon profitability of construction project not a "wage"). Profitability is not a contingency in the present matter; yet, the District Court found the bonuses at issue are not "wages."

The District Court relied upon contingencies which the Indiana Supreme Court has never examined. The District

Court found that the manager bonuses were based on meeting sales and operation goals. The definition of "wages" is "... all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or in any other method of calculating such amount." I.C. §22-2-9-1(b). If a "wage" does not include meeting sales goals, then this would draw into question whether the bonus offered by a home builder to its salespeople for selling a certain number of homes in a particular month or quarter is a "wage." This is one of the issues in the class action matter of *Locke v. CP Morgan Communities, L.P.*, Cause No. 49D12-0710-PL-46214, pending in Marion County Superior Court.[4] Likewise, if a "wage" cannot be earned by meeting operational goals, then this could affect whether the bonuses paid to employees for meeting goals associated with the management of accounts are "wages." This is one of the issues in the class action matter of *Quezare v. ByRider Finance, Inc.*, Cause No. 29D01-0805-PL-587, pending in Hamilton County Superior Court.[5] The Indiana Supreme Court must be given the opportunity to address the contingencies at issue in this matter to clarify what factors determine if a bonus is a "wage" or not.

B. Whether a Retention Provision Violates the Ten Day Rule has Never Been Examined by the Indiana Supreme Court.

The finding by the Seventh Circuit that an Indiana employer can condition a bonus as it sees fit is erroneous as a matter of Indiana law. However, this is the finding that

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[4] Counsel for Petitioners below is also counsel for the plaintiff/employees in the *Locke* action.

[5] Counsel for Petitioners below is also counsel for the plaintiff/employees in the *Quezare* action.

enabled the Seventh Circuit to avoid addressing whether the retention provisions presented by the bonus programs violate the Ten Day Rule. In support of this holding, the Seventh Circuit relied upon *Dove v. Rose Acre Farms, Inc.*, 434 N.E.2d 931 (Ind. Ct. App. 1982) and *Montgomery Ward & Co. v. Guignet*, 45 N.E.2d 337 (Ind. Ct. App. 1942). *Id.* However, neither of these decisions support the broad rule articulated by the Seventh Circuit. In *Dove*, the plaintiff/employee failed to meet one of the conditions of his bonus, namely perfect attendance during the bonus time period, and was denied his bonus. *Dove*, 434 N.E.2d at 933. The condition at issue was to be met during the compensable time period at issue, not afterwards; thus, the *Dove* matter is clearly distinguishable from the matter at hand which involves a condition outside of the compensable time period. The condition in *Dove* could not possibly violate the Ten Day Rule.

Likewise, in *Guignet*, the plaintiff/employee failed to fulfill one of the conditions of the bonus, namely continuous employment throughout the year in which the bonus was calculated, and was denied the bonus. *Guignet*, 45 N.E.2d at 664. Once again, the condition at issue was to be met during the compensable time period at issue, not afterwards; thus, this case is distinguishable. Employees do not contest the ability of an employer to condition a bonus on continued employment during the bonus time period; however, once the compensable period has ended, the Ten Day Rule dictates that payment is to be made.

Compliance with Indiana law is mandatory; thus, a bonus or any other type of compensation can only be conditioned in a manner which comports with Indiana law. *See Naugle*, 864 N.E.2d at 1065 ("[T]he statute by its terms mandates compliance."); *see also Reel*, 873 N.E.2d at 80 (holding that an employer could not circumvent the time

dictates of Wage Claims Statute for the payment of paid time off via a published employment policy). The retention element of Employer's bonus programs violates Indiana's Ten Day Rule. Factually, it is undisputed that the compensation is calculated based solely upon the monthly or quarterly performance of Employees and their store. Likewise, there is no dispute that the period of compensation at issue is a calendar month or quarter. The only question is whether an employer can condition the earning of these monthly and quarterly performance-based compensation on a condition that occurs months after the compensable time period has expired. No Indiana appellate court, including the Supreme Court, has every addressed this issue. This is clearly a novel state-law question.

C. The Failure of the Seventh Circuit to Certify Questions to the Indiana Supreme Court to Avoid a Conflict Between the State and Federal Appellate Courts was an Abuse of Discretion.

Novel state-law questions exist in this case which dictate that the certification procedure must be utilized to resolve the conflict between the Indiana Court of Appeals and the Seventh Circuit. In *Arizonans for Official English v. Arizona,* 520 U.S. 43 (1997), this Court found that the "[c]ertification procedure ... allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans,* 520 U.S. at 76 (citation omitted). "Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save "time, energy, and resources and help build a cooperative judicial federalism." *Id.* at 77 (quoting *Lehman Brothers v. Schein,* 416 U.S. 386, 391 (1974)). Certification is meant to "greatly simplify" the

adjudication by a federal court. *Id.* at 79 (citing *Bellotti v. Baird,* 428 U.S. 132, 151 (1976)). By failing to certify questions to the Indiana Supreme Court and issuing a conflicting decision, the Seventh Circuit actually "muddied the waters" of this area of Indiana law making things worse, not better.

What constitutes a "wage" is a local matter for which it is the responsibility of the Indiana Supreme Court to weigh any policy considerations and render its decision. In *Town of Castle Rock v. Gonzales,* 545 U.S. 748 (2005), Justice Stevens in his dissent stated that "... principles of federalism and comity favor giving a State's high court the opportunity to answer important questions of state law, particularly when those questions implicate uniquely local matters ... and might well require the weighing of policy considerations for their correct resolution." *Gonzales,* 545 U.S. at 777 (Stevens, J., dissenting) (citing *Elkins v. Moreno,* 435 U.S. 647, 662, n. 16 (1978)). Justice Stevens correctly noted that certification promotes fairness to the parties because it alleviates the possibility that a state's highest court could later disagree with the advisory opinion issued by a federal court. *Gonzales,* 545 U.S. at 778 (Stevens, J., dissenting) (citing *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 510 (1985) (O'Connor, J., concurring) ("Speculation by a federal court about the meaning of a state statute in the absence of a prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court")). Employees have raised three (3) novel state-law questions[6] which must be directed to the Indiana Supreme

[6] On the third question, do these bonuses constitute "present" or "deferred" compensation, the Indiana Supreme Court has never addressed or analyzed this issue.

Court for resolution. Under no circumstances should this Court allow the conflict between state and federal appellate courts persist.

Conclusion

For the reasons articulated, this Court should grant the Petition for a Writ of Certiorari, vacate the decision of the Seventh Circuit Court of Appeals, and remand this matter back to the Seventh Circuit with instructions to certify the three (3) questions posed by Employees to the Indiana Supreme Court.

Respectfully submitted,

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Pro Se

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 07-3488

BRIAN HARNEY, BRETT DEBOARD and DARLA GREINER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

SPEEDWAY SUPERAMERICA, LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 05 C 1912—**Larry J. McKinney**, *Judge.*

ARGUED APRIL 18, 2008—DECIDED
MAY 30, 2008

Before BAUE R, FLAUM and WILLIAMS, *Circuit Judges.*

BAUER, *Circuit Judge.* Plaintiffs brought a class action lawsuit against their employer, Speedway SuperAmerica LLC, alleging that the manner in which Speedway pays and forfeits its employees' bonuses violates Indiana's Wage Payment Statute and Wage Claims Statute. The district court granted summary judgment to Speedway, finding that Plaintiffs' bonuses did not constitute "wages" under

Indiana law, and therefore the two statutes did not apply. At best, the district court held, the bonuses were a form of "deferred compensation," which were forfeited when Plaintiffs failed to meet the bonuses' condition of continued employment with Speedway. Plaintiffs now appeal the district court's grant of summary judgment to Speedway, claiming that the district court erred in determining that the bonuses were not "wages" under Indiana law, and that the retention element of Speedway's bonus programs violates Indiana law.

We have reviewed the issues addressed by the district court and have determined that it ruled appropriately and without error in granting Speedway's motion for summary judgment. Accordingly, we adopt the district court's thorough and well-reasoned order, dated September 13, 2007, as our own and affirm the judgment of the lower court on all counts. A copy of the district court's order is attached and incorporated herein.

Plaintiffs also move to certify certain questions of state law to the Indiana Supreme Court, and to stay this appeal pending a decision from the Indiana Supreme Court. Plaintiffs contend that there is no clear controlling precedent to guide the state law issues of (1) whether the Plaintiffs' bonuses constitute "wages" under Indiana law; (2) whether the retention element of Speedway's bonus programs violates Indiana law (specifically, Indiana's Ten Day Rule) and is void as a matter of law; and (3) whether Speedway's bon uses constitute "present" or "deferred" compensation.

A case is appropriate for certification where it "'concerns a matter of vital public concern, where the issue is likely to recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to

illuminate a clear path on the issue.' " *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 514 F.3d 651, 659 (7th Cir. 2008) (quoting *Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 639 n.18 (7th Cir. 2002)); *see also* Cir. R. 52; Ind. R.App. P. 64(A). Questions that are tied to the specific facts of a case are typically not ideal candidates for certification. *Plastics Eng'g Co.*, 514 F.3d at 659. Thus, if certification would produce a fact bound, particularized decision lacking broad precedential significance, certification is inappropriate. *Id.* (citing *Erie Ins. Group v. Sear Corp.*, 102 F.3d 889, 892 (7th Cir. 1996)).

This case hinges entirely on whether the Plaintiffs' bonuses were "wages" under Indiana law, since Indiana law makes clear that bonuses may be conditioned however an employer sees fit, and that these bonuses would at best be deferred compensation subject to forfeiture. *Dove v. Rose Acre Farms, Inc.*, 434 N.E.2d 931, 934 (Ind. Ct. App. 1982) ("An employee is not entitled to a bonus until after the time stipulated in the contract for its payment, or until other conditions designated in the contract for its payment have been fulfilled . . ."); *Montgomery Ward & Co. v. Guignet*, 45 N.E.2d 337, 339-40 (Ind. Ct. App. 1942) (explaining that bonuses contingent on continued employment are valid and benefits of bonus are not conferred upon employee unless all conditions of the bonuses are met); *Swift v. Speedway SuperAmerica LLC*, 861 N.E.2d 1212, 1215-16 (Ind. Ct. App. 2007), *reh'g and trans. Denied* (concluding that these same bonuses were at best deferred compensation but were forfeited because employee had failed to meet the eligibility requirement of continued employment). So, we need only decide if certification is appropriate on the issue of whether Plaintiffs' bonuses constitute "wages" under Indiana law.

Our analysis in this case involves the interpretation of a specific bonus program of a single Indiana employer as

applied to Plaintiffs' particular factual circumstances. It is difficult to see how the determination of these employees' personal circumstances could have a far-reaching precedential effect for others. As the district court's opinion makes clear, the Indiana Supreme Court has provided guidance on when bonuses constitute "wages" under Indiana law. Because Plaintiffs are merely seeking a determination that *their* bonuses constitute wages, this case is not appropriate for certification.

We affirm the district court's grant of summary judgment to Speedway and deny Plaintiffs' request for certification.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN HARNEY, BRETT DEBOARD, and DARLA GREINER, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

SPEEDWAY SUPERAMERICA, LLC,
Defendant.

1:05-cv-1912-LJM-WTL

ORDER ON MOTION FOR SUMMARY JUDGMENT

This cause is before the Court on Defendant's, Speedway SuperAmerica, LLC ("Speedway"), Motion for Summary Judgment (Docket No. 22). Plaintiffs, Brian Harney ("Harney"), Brett DeBord ("DeBord") [1], and Darla Greiner ("Greiner") (these defendants collectively, "the Managers"), filed this lawsuit in state court before it was removed to this Court [1]pursuant to the Class Action Fairness Act of 2005. The Managers seek to recover on behalf of themselves and all others similarly situated pursuant to Indiana's Wage Claims Statute (Indiana Code § 22-2-9-1 *et seq.*) and Wage Payment Statute [2] (Indiana Code § 22-2-5-1 *et seq.*) for allegedly unpaid bonuses and wages.[1] The parties have

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[1] It appears from the parties' briefs that Mr. Debord's name was incorrectly spelled in the caption. The Court will use "DeBord" in this Order.

[2] Because she was involuntarily terminated, Greneir is only seeking relief under the Wage Payment Statute. *See* Pls.' Sur-Reply at 2, n1.

fully briefed the issues and this matter is now ripe for ruling.

For the reasons stated herein, the Court **GRANTS** Speedway's motion.

I. BACKGROUND

The Managers are all former employees of Speedway whose employment ceased on October 11, 2005. Harney began employment in April 2004, and was an assistant store manager at the time that he was fired. DeBord began employment in March 2001, and was also an assistant manager at the time he was fired. Greiner began employment on December 17, 1996. She was a store manager at the time that her employment ceased and, unlike the other two plaintiffs, she chose to quit her employment.

During their employment, the Managers were paid on a weekly basis. They were also eligible for certain bonuses under programs established by Speedway. The different potential bonuses were outlined in detail in Speedway's Operations Manual and depended on the employee's classification during a particular month and quarter. One of the bonus programs was the Store Manager Bonus Program, which permitted store managers to earn monthly bonuses based on monthly performance objectives for their individual stores. Managers would earn bonus credits that could later be converted to cash payments. The bonus was contingent on several factors, such as meeting sales and operation goals. In addition, in order to receive this type of bonus, a store manager had to be employed on the last day of the second month after the bonus credits were earned. Speedway reserved the right to "amend, suspend, terminate, or change" the program at any time. *See* Seidel Aff., Exs. A-B.

The second type of bonus program was the Associate/Lead Assistant Manager Bonus Program. Similar to the Store Manager Bonus, receiving this type of bonus had an employment requirement attached to it. Specifically, in order to receive this bonus, Speedway's policy required that an employee be employed as the associate/lead assistant manager on the first day of the month and employed at the end of the second month following the month in which the bonus was earned. Like the Store Manager Bonus Program, Speedway reserved the right to "amend, suspend, terminate, or change" the Associate/Lead Assistant Manager Bonus Program at any time. *See* Seidel Aff., Exs. D-E.

The third and final type of bonus program was the Customer Satisfaction Rewards Program. This type of bonus was paid on a quarterly basis to assistant managers based on monthly objectives for their individual stores. Like the Store Manager Bonus, an employee would receive credits that could later be converted for a cash payout. Bonus credits were earned monthly if the assistant manager was employed on the first day of the month in which the credits were earned. Further, each credit would be given the value of $1.00 if the employee was still employed by Speedway on the last day of the second month after the end of the calendar quarter. Like the other types of bonuses, Speedway reserved the right to "amend, suspend, terminate, or change" the Customer Satisfaction Rewards Program at any time. *See* Seidel Aff., Exs. F-G.

Calculations for each of these bonuses was completed by Speedways's corporate office and then reviewed by region, district, and store managers. According to Speedway, the process of calculating and reviewing the bonuses typically took more than ten calendar days to complete. Paychecks were then mailed to the stores on Wednesdays following the

end of a pay period. The Managers contend that they were not paid these bonuses in a timely fashion under the Wage Payment and Wage Claims Statutes because they were not paid within ten calendar days of being "earned." *See* Complaint, ¶¶ 31-33. They also assert that they were not paid all wages that were "due and owing" in a timely fashion after their separation from employment. *See* Complaint, ¶¶ 34-35. With the exception of the bonus payments that the Managers contend that they are entitled to receive, there does not appear to be any dispute that Speedway timely-issued checks on October 19, 2005, for payment of the Managers' regular earned wages, including accrued but unused vacation pay, after the Managers' separation. *See* Seidel Aff., ¶¶ 12, 27-29, 47-50, 53-56 and Exs. C, H, and I.

II. SUMMARY JUDGMENT STANDARD

As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *United Ass'n of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1267-68 (7th Cir. 1990), *cert. denied*, 499 U.S. 923 (1991). Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

> material fact and that the moving party is entitled to a judgment as a matter of law.

Summary judgment is the "put up or shut up" moment in a lawsuit. *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003), *reh'g denied*. Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials that "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 997 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997). It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which he relies. *See Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). When the moving party has met the standard of Rule 56, summary judgment is mandatory. *See Celotex*, 477 U.S. at 322-23; *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992).

In evaluating a motion for summary judgment, a court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. *See Estate of Cole v. Fromm*, 94 F.3d

254, 257 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *See Anderson*, 477 U.S. at 248; *JPM Inc. v. John Deere Indus. Equip. Co.*, 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. *See Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). "If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party." *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

III. DISCUSSION

This case involves claims under two different statutory provisions. Therefore, as an initial matter, it is necessary to lay out the differences between the two.

The Wage Payment Statute, Indiana Code § 22-2-5-1 *et seq.*, provides employees the right to receive wages in a timely fashion. *See St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 703 (Ind. 2002). The Wage Payment Statute requires that an employer pay its employees' wages within ten days of the date that they are earned and provides for damages against those employers who fail to do so. *See* Ind. Code §§ 22-2-5-1 and -2; *Naugle v. Beech Grove City Schs.*, 864 N.E.2d 1058, 1066-69 (Ind. 2007). By its terms, it only applies to current employees or those who voluntarily terminate their employment. *See* Ind. Code § 22-2-5-1; *Steele*, 766 N.E.2d at 705.

The Wage Claims Statute, Indiana Code § 22-2-9-1 *et seq.*, describes how disputes about the amount of wages due are resolved and requires that unpaid wages or

compensation of a discharged employee are "due and payable at regular pay day for the pay period in which separation occurred." *See* Ind. Code § 22-2-9-2-(a); *Steele*, 766 N.E.2d at 704. Unlike the Wage Payment Statute, the Wage Claims Statute only applies to employees who have been discharged or suspended from work because of an industrial dispute. *See Steele*, 766 N.E.2d at 705.

Based on the differences in these two statutes, it is clear that Greiner's claims arise only under the Wage Payment Statute because she voluntarily terminated her employment with Speedway. In fact, she has now conceded as much. *See* Pls.' Sur-Reply at 2, n.1. With respect to Harney and DeBord, both of whom were discharged, the answer cannot be so easily categorized. However, the 3 The program appears to be exactly the same as one of the programs involved in this case. Court concludes that (1) their claims for bonuses that they did not receive are governed by the Wage Claims Statute, and (2) those bonuses that they did receive while still employed, but which were paid outside of the ten-day period, are governed by the Wage Payment Statute.

Regardless of which statutory provision applies, it is clear that the Managers are not entitled to the unpaid bonuses. A condition for receiving those bonuses was continued employment, and it is undisputed that none of the Managers satisfied that criteria. Thus, even if the unpaid bonuses are "wages," the Court agrees that, at best, they are deferred compensation and therefore subject to forfeiture. *See Swift v. Speedway SuperAmerica LLC*, 861 N.E.2d 1212, 1215-16 (Ind. Ct. App. 2007), *reh'g and trans. denied* (concluding that bonuses under Store Manager Bonus Program were wages that could be forfeited and that plaintiff was not entitled to receive them because she had failed to meet the eligibility requirement of maintaining

employment). [3] Because the[3] Managers failed to meet the eligibility requirements for the unpaid bonuses, they are not entitled to receive them. Accordingly, the Managers claims for unpaid bonuses are **DISMISSED with prejudice.**

The final question to resolve is whether the Managers are entitled to damages for the failure of Speedway to pay bonuses within the ten-day period while the Managers were still employed. The answer depends on whether the bonuses are "wages." At first blush, *Swift* suggests that they are wages because it concluded that bonuses under the Store Manager Bonus Program were deferred compensation. However, *Swift* merely discussed the differences between present compensation and deferred compensation; it did not undertake an analysis about whether the bonuses are truly considered "wages" under the Wage Payment Statute or the Wage Claims Statute. Thus, the Court does not find *Swift* compelling or persuasive on that issue.

To resolve this dispute, the Court is guided by precedent from the Indiana Supreme Court. The Indiana Supreme Court has stated that "[a] 'bonus' is a wage 'if it is compensation for time worked and is not linked to a contingency such as the financial success of the company.'" *Highhouse, M.D. v. Midwest Orthopedic Inst., P.C.*, 807 N.E.2d 737, 740 (Ind. 2004) (quoting *Pyle v. Nat'l Wine & Spirits Corp.*, 637 N.E.2d 1298, 1300 (Ind. Ct. App. 1994). *See also Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118, 1121-22 (7th Cir. 1998) (cited with approval by *Highhouse* for the proposition that pay based on profits rather than a claimant's own time, effort, or product was not a wage); *Manzon v. Stant Corp.*, 138 F. Supp. 2d 1110, 1113 (S.D. Ind. 2001) (cited with approval by *Highhouse* for the proposition that a bonus based on a financial target and

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[3] The program appears to be exactly the same as one of the programs involved in this case.

achieving "individual personal objectives" was not a wage). Based on this definition, the Indiana Supreme Court concluded that a bonus payment tied to an employer's overall operations was not a wage. *See Highhouse*, 807 N.E.2d at 740.

The Indiana Supreme Court further illustrated the practical reasons why a bonus tied to other contingencies is not a "wage." Specifically, unlike wages, such bonuses often cannot be calculated within a short period of time after services are performed. *See id.* Finally, while the court cautioned that an employer cannot escape the law by obtaining an agreement from an employee that wages will not be paid within the statutorily-prescribed time period, it noted that the employment contract called for annual payments. *See id.* According to the *Highhouse* court, this fact lent support to the view that the parties recognized that frequent bonus calculations and payment would be difficult, if not impossible. *See id.* In other words, this circumstance underscored that the parties themselves did not consider the bonus to be a wage.

Based on *Highhouse*, the Court concludes that the bonuses involved in this case are not "wages" under the Wage Payment Statute or Wage Claims Statute. The bonuses were each contingent on factors other than time worked. For example, the Store Manager and the Associate/Lead Assistant Manager Bonuses were based, in part, on meeting sales and operation goals. Similarly, bonuses under the Customer Satisfaction Rewards Program were dependent on factors beyond an employee's individual performance. Moreover, entitlement to the bonuses was explicitly conditioned on maintaining employment for a period of time. Indeed, this condition made it impossible to calculate the bonuses at the time that the bonus credits

were "earned" because this condition had not yet been satisfied.

Finally, because each bonus program explained when the bonus payments would be made, the parties should have been aware that payments were not like regular wages and that calculations would be difficult to make. As in *Highhouse*, this circumstance further illustrates that the bonuses were not "wages." Accordingly, in light of all of the foregoing, the Court finds that the bonuses at issue in this case were not "wages" within the meaning of the Wage Payment Statute or Wage Claims statute.

The Court's conclusion is not altered by the recent decision in *Reel v. Clarian Health Partners, Inc.*, --- N.E.2d---, 2007 WL 2481792 (Ind. Ct. App. Sept. 5, 2007). There, Clarian had a policy of paying terminated employees their "paid time off" wages ("PTO wages") some fourteen days after paying the terminated employees their final regular wages. As the court discussed, the PTO wages were "wages"under Indiana law, and the employees' right to the wages had vested. *Reel*, ---N.E.2d ---, 2007 WL 2481792, *4-5. Thus, because the PTO wages were wages under the statute and the employees had a vested right to them, Clarian could not vary from the payment terms provided by law. *Id.* at *5.

Unlike the plaintiffs' PTO wages in *Reel*, the bonuses in this case were not wages under Indiana law. Moreover, unlike the timing of payments in *Reel*, the timing for paying of bonuses in this case was in part due to the fact that entitlement to the bonuses was conditioned on maintaining employment. Rather than being a matter of necessity or expediency, conditioning the payment on continued employment serves Speedway's interest in retaining quality managers and avoiding turnover and the cost of hiring or retraining replacement managers. In short,

Reel is distinct and the Court declines to apply it to this case. The bonuses were not wages and the Managers are not entitled to damages for alleged late payments of them. Accordingly, the Managers' claims for damages are **DISMISSED with prejudice**.

As a final matter, because the Court has dismissed all of the Managers' claims, the pending Motion for Class Certification (Docket No. 14) is now moot. Therefore, the Court **DENIES as MOOT** that motion.

IV. CONCLUSION

For the foregoing reasons, Defendant's, Speedway SuperAmerica, LLC, Motion for Summary Judgment (Docket No. 22), is **GRANTED**. Plaintiffs', Brian Harney, Brett DeBord, and Darla Greiner, claims are **DISMISSED with prejudice**.

In addition, Plaintiffs' Motion for Class Certification (Docket No. 14) is **DENIED as MOOT**.

IT IS SO ORDERED this 13th day of September, 2007.

s/Larry J. McKinney
LARRY J. McKINNEY,
CHIEF JUDGE
United States District Court
Southern District of Indiana

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USCA-02-C-0072—5-30-08

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 5, 2008
Before
WILLIAM J. BAUER, *Circuit Judge*
JOEL M. FLAUM, *Circuit Judge*
TERENCE T. EVANS, *Circuit Judge*

No. 07-3488

Brian Harney, Brett DeBoard and Darla Greiner, on behalf themselves and all others similarly situated,	Appeal from the United States District Court for the Southern District of Indiana,
Plain tiffs-Appellants,	Indianapolis Division.
v.	No. 05 C 1912
Speedway SuperAmerica, LLC.,	Larry J. McKinney,
Defendant-Appellee.	*Judge.*

ORDER

On consideration of the petition for panel rehearing filed by plaintiffs-appellants on June 27, 2008, in connection with the above-referenced case, all of the judges on the original panel have voted to deny the petition. It is, therefore, ORDERED that the petition for panel rehearing is DENIED.